GOI AH SOONG

v.

KUMPULAN WANG SIMPANAN PEKERJA & ANOR

HIGH COURT MALAYA, SHAH ALAM
YAACOB MD SAM J
[JUDICIAL REVIEW NO: 25-88-2011]
3 OCTOBER 2012

ADMINISTRATIVE LAW: *Judicial review - Remedies - Certiorari - Application for - Application to quash decision of first respondent made under Employees Provident Fund Act 1991 - Whether applicant entitled to EPF contributions - Whether second respondent liable to make contributions to EPF - Whether applicant an employee of second respondent within meaning of Employees Provident Fund Act 1991 - Whether first respondent misconstrued law - Whether irrelevant matters taken into consideration - Whether application dismissed*

PROVIDENT FUND: *Employer's contribution - Failure to pay contributions - Whether liable - Whether applicant an employee of second respondent within meaning of Employees Provident Fund Act 1991 - Whether applicant a person employed under a contract of service - Whether second respondent intended to employ applicant as an employee - Whether applicant's service was a contract for service - Whether applicant entitled to EPF contributions*

The applicant filed an application under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of the first respondent that was made under the Employees Provident Fund Act 1991 ('the Act'). Briefly, the second respondent had leased a bungalow ('the bungalow') for the use of its employees. In order to ensure that the bungalow was kept in good condition at all times, the second respondent engaged the services of the applicant to, *inter alia*, ensure the cleanliness of the bungalow and to supply food and drinks to the visiting managers or employees. The applicant was not provided with any letter of appointment but was employed on an oral contract. For the services, the applicant was allowed a 10% profit on the amount that was charged to the aforementioned visitors of the bungalow. The second respondent had paid the applicant, *inter alia*, RM1,250 as caretaker's allowance and also provided him with *ex-gratia* payments ranging from RM1,725 to RM2,500 each year. Further,

A *vide* letter dated 24 September 1993, the applicant was informed that his monthly salary was increased to RM1,050 with effect from 1 July 1993. However, in 2008, the applicant wrote to the second respondent's chairman requesting that the second respondent make contributions on his behalf to the Employees Provident Fund
B ('EPF'). In 2009, the second respondent terminated its lease for the bungalow and as a result, the applicant's services were no longer required. The applicant then lodged a complaint with the first respondent regarding the alleged second respondent's non-contribution to the EPF on his behalf. *Vide* letter dated 4 May
C 2011, the first respondent informed the applicant that based on investigations conducted, the second respondent was not liable to make contributions to the EPF on behalf of the applicant because the agreement entered into by the second respondent and the applicant was a contract for service. It was argued by the
D applicant, *inter alia*, that he was a domestic servant within the meaning of the Act. The issue that arose for determination was whether the applicant was a person employed under a contract of service in order for him to be considered as an employee for the purposes of the Act.

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Held (dismissing application with costs):

(1) It is trite that in order to succeed in an application for judicial review, the applicant must show that the first respondent had,
F *inter alia*, misconstrued the law and took irrelevant matters into consideration (*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union*; refd). (para 12)

(2) In order to be entitled to have the EPF contributions paid on his behalf, the applicant must show that he was an
G "employee" falling within the purview of the Act. The burden rests on the applicant. (para 5)

(3) In the absence of an express written contract or letter of appointment, the true intention of the parties were reflected
H in that the applicant had never been intended to be employed as an employee but a mere contract for services with the second respondent. Further, there was no evidence to show that the second respondent exercised any sort of control over the applicant and the manner in which the applicant
I performed his tasks. (para 14)

(4) The fact that the applicant was entitled to a profit of 10% of the sum charged to patrons of the bungalow on top of the fixed monthly payments was consistent with a contract for services in which no domestic servant would be able to enjoy the same kind of control that the applicant had over the way he performed his tasks. In addition, the fact that the lease for the bungalow was terminated and the applicant's services were no longer needed and ceased was consistent with the situation that the applicant had not been dismissed by the second respondent but rather that his contract for services had come to an end. Hence, the applicant's service was a contract for service and not a contract of service. (para 14)

(5) The first respondent had not-erred in law or facts in coming to the finding that a contract for service had been entered into between the second respondent and the applicant. Thus, it relieved the second respondent of any legal duty to make contributions to the first respondent on the applicant's behalf. (para 15)

Case(s) referred to:

American International Assurance Co Ltd v. Dato' Lam Peng Chong & Ors [1999] 2 CLJ 771 CA ***(refd)***

Bata Shoe Company (Malaya) Ltd v. Employees Provident Fund Board [1966] 1 LNS 18 HC ***(refd)***

Employees Provident Fund Board v. Bata Shoe Company (M) [1968] 1 LNS 35 FC ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Employees Provident Fund Act 1991, ss. 2, 37A
Rules of the High Court 1980, O. 53 r. 2(4)

For the plaintiff - Arun Kumar; M/s Murugavell Arumugam & Co
For the 1st respondent - Shahrizan; Legal Advisor, EPF
For the 2nd respondent - Suganthi Singam; M/s Shearn Delamore & Co

Reported by Kumitha Abd Majid

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JUDGMENT

Yaacob Md Sam J:

[1] This in an application filed by the applicant under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the decision of the 1st respondent dated 4 May 2011 that was made under the Employees Provident Fund Act 1991.

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[2] More precisely, the relief sought by the applicant in this application are as follows:

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(a) that the decision of the 1st respondent dated 4 May 2011 (exh. "GAS15") be quashed;

(b) that a declaration be issued that the applicant is an employee within s. 2 and the 1st Schedule of the Employees Provident Fund Act 1991 (EPF Act);

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(c) that an order of *mandamus* be issued on the 1st respondent to take action under s. 37A of the EPF Act to assess the arrears of contributions due to the applicant; and

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(d) other consequential orders be made.

Facts Of The Case

[3] The relevant facts are as follows:

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3.1. The 2nd respondent, formerly known as Dunlop Malaysia Industries Sdn Bhd ("DMIB"), had leased a bungalow at 74, Batu 8 ½ Beach Terrace, Port Dickson, Negeri Sembilan from Sri Changkat Sdn Bhd for the use of the 2nd respondent's employees. Following a business merger that took place later, the BMIB had assumed the current name.

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3.2. In order to ensure that the bungalow was in good condition at all time, sometimes in 1968 the 2nd respondent engaged the service of the applicant. The applicant was not provided with any letter of appointment but was employed on an oral contract. He was required to ensure the upkeeping and cleanliness of the bungalow. In addition, the applicant would also supply food and drink to the visiting managers or employees. For the services, the applicant was allowed a 10% profit on the amount that was charged to the

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aforementioned visitors of the bungalow. He was paid a basic salary of RM250 per month and the amount remained until 1976 when he made an appeal to the 2nd respondent's factory manager in Seremban for salary increment. In 1991 his salary was increased by the 2nd respondent from RM750 to RM850 per month. In addition, all the equipments he needed to carry out his duties including the furniture, cooking utensils, stove, washing machine, mops, brooms, detergents, etc. were supplied by the 2nd respondent. On 1 March 1993 the applicant's salary was increased from RM850 to RM950 a month with effect from 1 July 1992 and he was also awarded a bonus of RM1,375 (exh. "GAS4"). By a letter dated 24 September 1993 the applicant was informed that his monthly salary was increased to RM1,050 with effect from 1 July 1993 (exh. "GAS5"). Paragraph 2 of the said letter also states as follows:

> In view of your 25 years of service that you have served as a Caretaker, the Management has also approved an *ex-gratia* of $(RM)1,725.00 for you which is inclusive of bonus.

3.3. Remittance Advice dated 18 August 1993 in exh. "GAS6" showed that the sum of RM1,150 was paid to the applicant as "Caretaker's allowance – PD". On 6 December 1993 the 2nd respondent paid the applicant a sum of RM2,325 as "bonus + salary" (exh. "GAS7"). On 24 January 1994, the 2nd respondent paid the applicant a sum of RM1,250 as "caretaker's allowance" (exh. "GAS8"). He was also provided with *ex-gratia* payments ranging from RM1,725 to RM2,500 each year (exhs. "GAS9").

3.4. *Vide* letter dated 1 March 2008, the applicant wrote to the Chairman of the 2nd respondent, requesting that the 2nd respondent make contribution on his behalf to EPF (exh. "GAS10).

3.5. At the end of 2009, the 2nd respondent terminated its lease of the bungalow with Sri Changkat Sdn Bhd. As a result, the applicant's services was no longer required.

3.6. On 9 February 2011, the applicant lodged a complaint with the 1st respondent regarding the alleged 2nd respondent's non-contribution to EPF on his behalf (exh. "GAS11'). On

A 11 March 2011, an investigating officer of the 1st respondent recorded written statements of the applicant and the human resource manager of the 2nd respondent (exh. "GAS14" and (exh. "AMS1").

B 3.7. *Vide* a letter dated 4 May 2011, the 1st respondent informed the applicant that based on the investigation conducted, the 2nd respondent was not liable to make contribution to the EPF on behalf of the applicant because the agreement entered into by the 2nd respondent and the C applicant was a "contract for service". The 1st respondent's letter was signed by its Head of Enforcement (exh. "GAS15"). The letter further stated that the applicant's complaint was deemed settled and closed. For clarity, para. 2 of the letter is copied as follows:

D > 2. Sila ambil maklum bahawa berdasarkan siasatan kes, didapati tiada tanggungan mencarum wujud diantara pengadu dan syarikat memandangkan terdapat perjanjian "contract for service" yang dimasuki kedua-dua pihak majikan dan pekerja.

E **Issue**

[4] The issue for the court to determine is whether or not the applicant was a person employed under a contract of service. If he is deemed to have been employed under a contract of service, F he would be considered an employee for the purposes of the EPF Act.

Whether The Applicant Is An "Employee" For The Purposes Of The EPF Act 1991 And The Court's Decision

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[5] In order to be entitled to have EPF contributions paid on his behalf by the 2nd respondent, the applicant must show that he is an "employee" falling within the purview of the EPF Act 1991. The burden rests on the applicant. Section 2 of the Act H defines an "employee" for the purposes of the Act as:

> any person, not being a person of descriptions specified in the First Schedule, who is employed under a contract of service or apprenticeship, whether written or oral and whether expressed or implied, to work for an employer.

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[6] In the case of *Employees Provident Fund Board v. Bata Shoe Company (M)* [1968] 1 LNS 35 FC, it was held: A

> Whether or not there was a contract of service and between whom is a pure question of fact.

[7] In *American International Assurance Co Ltd v. Dato' Lam Peng Chong & Ors* [1999] 2 CLJ 771 CA, at p. 776, His Lordship Gopal Sri Ram JCA (as he then was) stated as follows: B

> First, the issue whether a person is a workman as defined by the Act depends upon the nature of the engagement in a given case. A person is a workman if he is engaged under a contract of service. But he is an independent contractor and therefore not a workman if his engagement is pursuant to a contract for services. The point has been concluded by binding authority. C
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> In *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1996] 4 CLJ 687, the Federal Court laid down the applicable test in the following terms: D
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> In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 at p. 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. E F
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> It is fairly plain to see why flexibility is achieved by having resort to this test.
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> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. G H I

When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

In the present instance, the Industrial Court applied the test laid down in the foregoing passage. After examining the totality of the evidence before it and after considering all the features of the several agency leaders contracts the Industrial Court concluded that the respondents had been engaged under a contract of service. The Industrial Court also correctly concluded that the respondents had been engaged in two capacities, both as agents as well as agency leaders. It was the contract for the latter engagement that was the subject matter of the alleged dismissal. And it was with the nature of the engagement under the latter contract that the Industrial Court was concerned. We are therefore in agreement with the submission of counsel for the respondents that the Industrial Court adopted the correct approach, asked itself the right question and took into account relevant considerations when making the impugned award. It follows that the award under challenge does not contain any error of law in the wider Anisminic sense. See, *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union* [1995] 2 CLJ 748. The Industrial Court did not therefore exceed its jurisdiction.

Second, it is clear from the decisions in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304 and *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1996] 4 CLJ 687 that the question whether a person is a workman is one of mixed law and fact for the Industrial Court to decide. "The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for (sic) service": (per Chang Min Tat FJ in *Dr A Dutt v. Assunta Hospital (ibid)* at p. 310).

[8] In *Bata Shoe Company (Malaya) Ltd v. Employees Provident Fund Board* [1966] 1 LNS 18, His Lordship Gill J stated as follows:

A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive. (See *Halsbury*, 3rd Edn, vol 25, p. 448, para. 872).

In *Short v. J & W Henderson, Ltd,* [1946], 174 LT 417, 427, Lord Thankerton recapitulated with approval the four indicia of a contract of service derived by Lord Justice Clerk in *Park v. Wilsons and Clyde Coal Co. Ltd*, [1928] SC 121, 134 from the authorities referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the doing of the work; and (d) the master's right of suspension or dismissal. Lord Justice Clerk had gone on to say that a contract of service may still exist if some of these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.

It is to be observed that the relationship of master and servant is characterized by a contract of service, express or implied, between the master and the servant. A contract of service is to be distinguished from a contract for services because a person who contracts to provide services for another person is not a servant but an independent contractor. To distinguish between an independent contractor and a servant, the generally accepted test is whether the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. In *Stevenson Jordan & Harrison, Ltd v. MacDonald and Evans* [1952] 1 TLR 101, 111, Lord Justice Denning said:

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

In the present case, by virtue of cl. 3 of the agreement the company has considerable control over its shop managers. The only fact which seems to suggest that the manager is an independent contractor is that he is not paid a salary but a commission and that it is he and not the company who has to pay certain expenses incurred in the running of the shop, including the wages of the retail staff. However, a servant may be paid his remuneration by way of commission rather than by way of a fixed salary (see *Pauley v. Kenaldo* [1953] 1 All ER 226). Payment by

A the manager of expenses, including wages of salesmen employed by him, out of the commission which he gets from the company under the agreement, does not necessarily constitute him an independent contractor. It is all a matter of arrangement for the sake of convenience and expediency, so that in effect the
B manager's remuneration boils down to what is left over after he has paid out all such expenses out of his commission. Taking all the facts into consideration, I am of the opinion that the shop manager is a servant of the company and is in fact so regarded by the company by reason of the amount of control which the company exercises over him.

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[9] It was submitted for the applicant that the 2nd respondent has referred to the applicant as a caretaker and not as a contractor. It was also submitted that if the applicant had been appointed as a supplier of services, the 2nd respondent would not
D have referred to him a caretaker. Learned counsel for the applicant further submitted that the documents referred to as exhibits "GAS3", "GAS4", "GAS5" and "GAS7" indicate that the applicant was paid a salary and bonuses which only due to be paid to employees and not to independent agents or contractors.
E It was also submitted that based on the letter issued by the 2nd respondent to the applicant, it indicates that the 2nd respondent did exercise control over the applicant in the manner he did his work. Counsel further argued that the 10% commission that the applicant received does not mean that the applicant was making a
F profit because most persons who used the bungalow did not require him to prepare food or drinks. Certain expenses would have to be incurred by the applicant in preparing the food and drinks. Hence, it was submitted that the 10% commission that was paid to the applicant on the food and drinks supplied was nothing
G more than an arrangement for the sake of convenience and expediency. It was also submitted that, since the applicant was required to provide personal and exclusive service to the 2nd respondent, he could not have subcontracted the services to a third party. Counsel further added that in view of the fact that
H the 2nd respondent provided all tools including furniture, cooking utensils, stove and detergents, the applicant cannot be considered to be an independent contractor.

[10] In summary, the arguments of the applicant indicate the following:

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(i) the applicant was paid a basic salary each month for the work that he did. He had been granted increments on a year basis and paid bonus each year;

(ii) he was subject to control by the 2nd respondent; A

(iii) all tools, equipments and material he needed in the course of his work was supplied by the 2nd respondent;

(iv) there is no evidence to indicate that he provided services to the 2nd respondent as a person carrying out a business; B

(v) there was no chance for him to make profits or risk losses;

(vi) there was no term in his contract that was inconsistent with a contract of service; and C

(vii) that he was a domestic servant within the meaning of the EPF Act.

[11] Learned counsel for the 2nd respondent on the other hand submitted that this court has no jurisdiction to adjudicate on this D judicial review application because there is no decision to be quashed. It was submitted that the findings of the 1st respondent's head of enforcement is not a "decision" for the purposes of O. 53 r. 2(4) of the High Court Rules 1980. It was contended that there is no evidence that the applicant was subject E to fixed working hours, entitlement of off-days, etc, that are normally afforded to an employee. The applicant was hired with specific tasks that is to ensure the upkeep and cleanliness of the bungalow and it is solely on the applicant to determine how the services were to be performed. It was also submitted that that the F absent of an express written appointment clearly indicates that the 2nd respondent had never intended to employ the applicant as its employee but merely entered into a contract for services. It was further argued that based on the payments documents, the payments were made in return for the services supplied by the G applicant and not salary or wages in his capacity as the caretaker of the bungalow. On the supply of equipments, it was submitted that even though the 2nd respondent did not indicate the hours and the manner in which the applicant was to use them as well as where the applicant was to purchase his food and drinks H supplies from.

[12] It is trite that in order to succeed in an application for judicial review, the applicant must show that the 1st respondent had *inter alia*, misconstrued the law, had reached a decision that I was so perverse that no reasonable person similarly circumstances

would have reached, took irrelevant matters into consideration, failed to take relevant matters into consideration, or asked itself the wrong question (*Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748).

[13] In *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183; [1988] 3 MLJ 204 the Supreme Court had held as follows:

> The general principle would appear to be that it will usually be proper to treat a decision-maker's tasks of fact findings and the drawing of factual inference from established facts as falling within the decision-maker's jurisdiction, unless the decision-maker has reached absurd results or reached results absurdly.

[14] Having considered all the evidence presented, this court is of the view that the applicant's service is a contract for service and not a contract of service. This findings is based on the following piece of evidence and observation:

(a) absence of an express written contract or letter of appointment reflect the true intention of the parties that the applicant had never been intended to be employed as an employee but a mere "contract for services" with the 2nd respondent;

(b) most payments made to the applicant clearly stated that the payments were a "caretaker's allowance" and one-off *"ex-gratia"*;

(c) the increased payments made to the applicant had not automatically made but was only done upon the applicant's requests or appeals;

(d) there is no evidence to show that the 2nd respondent exercised any sort of control over the applicant and the manner in which the applicant to perform his tasks;

(e) that the applicant is entitled to a profit of 10% of the sum charged to patrons of the bungalow on top of the fixed monthly payments is consistent with a contract for services in which no domestic servant would be able to enjoy the same kind of control that the applicant had over the way he performed his tasks and to run the food and drinks business liking to a catering business;

(f) the supply of equipments that is kitchen appliances for the applicant's use is intended to facilitate the applicant's tasks to provide catering business but does not mean that the 2nd respondent had entered into a contract of service with the applicant;

(g) the fact that the bungalow was rented and subsequently the lease period was terminated and the services of the applicant was no longer needed and ceased is consistent with the situation that the applicant had not been dismissed by the 2nd respondent but rather his contract for services had come to an end.

[15] For the reasons that I have given, I do not find that the 1st respondent had erred in law or facts in coming to her finding that a contract for service had been entered into between the 2nd respondent and the applicant and thereby relieving the 2nd respondent of any legal duty to make contributions to the 1st respondent on the applicant's behalf. I would therefore dismiss this application with costs.